Study B-700 November 1, 1995

First Supplement to Memorandum 95-57

Unfair Competition: Draft of Tentative Recommendation (Comments from Interested Persons)

Attached to this supplement are several letters commenting on unfair competition issues reflected in the staff draft statute in Memorandum 95-57 and a related newspaper article. These materials are reproduced in the Exhibit:

At the meeting, the staff will draw the Commission's attention to the points made in these letters as the Commission reviews the draft statute. A brief overview is presented below, along with a limited amount of staff commentary. Specific points will be raised at the appropriate point in the review of the draft statute.

Misconceptions as to Direction of Study

Several commentators express serious, deep, or grave concern that this study may be directed at eliminating actions by private plaintiffs on behalf of the general public under the open-ended standing of Section 17200. (See, e.g., Exhibit pp. 5, 7-8, 9-10, 11, 15, 18.) While that is a *theoretical* option (and one that is consistent with the law of most, if not all, other states and with federal law), it has not been proposed to date and has not appeared in any draft statute before by the Commission. We can understand the concern of the consumer groups, but an examination of the staff drafts and the consultant's drafts should at least reduce the level of alarm. Nothing in the current draft or the prior draft would have the effect of eliminating suits under Section 17200 (or other provisions to which it applies) by bona fide public interest or consumer groups.

The other issues, many of them technical and interrelated, are still under active consideration. Groups that are unfamiliar with the Commission's procedures may have been mislead into thinking that the staff draft is a final or near final Commission proposal. The draft is prepared to help focus the discussion by providing specific language to review, modify, reject, or whatever. The Commission's normal procedure is to prepare an official "Tentative Recommendation" which is then widely distributed for comment. After a two or three month comment period, typically, the Commission will review the comments and make a final recommendation to the Legislature. Further amendments are likely to be made after a final recommendation is put in bill form and works its way through the Legislature.

Special Role of Prosecutors; Distinction Between Disgorgement and Restitution

Consistent with earlier comments, the CDAA letter emphasizes the role of prosecutors in enforcing the law on behalf of the people, as distinct from a class of people claiming restitution. (See Exhibit pp. 1-4.) In this connection, the letter argues that "disgorgement" differs from "restitution." The staff has not had time to give this idea full consideration, although we are aware of some cases that do not make any meaningful distinction on this ground. Further work needs to be done.

No Problems?

Several writers argue that there is no significant problem under the existing statute or that any problems that exist are worthy of statutory treatment. (E.g., Exhibit pp. 8, 18.) EDF argues that a "primary task of the Commission should be to establish the empirical basis, if any, for the assumed problems" addressed in this study. This issue has been discussed at prior meetings, and most recently in response to comments from visitors at the September meeting. One answer is that the Commission has been directed to study this matter in a legislative resolution. As to evidence of a need for statutory revisions, the Commission's consultant, Prof. Robert C. Fellmeth, has argued in his study that there are problems, and that problems are likely to increase. Articles cited in the materials support the conclusion that unfair competition causes are routinely tacked on to complaints.

Other Issues

The Proposition 103 letter suggests that the issue may be one of legal ethics and suggests that secret settlements should be disallowed. (Exhibit p. 8.)

Commission's Function and Reputation; Balance; Conflicts of Interest

EDF expresses concern about a "serious misuse of the Commission's resources and reputation" and suggests that pursuing statutory changes in this arena "runs the risk of jeopardizing both." (Exhibit p. 9.) NRDC suggests that the "'reforms' would place the Law Revision Commission squarely in the camp of the defense bar and industry, seriously jeopardizing the Commission's well-established role as a neutral and independent body." (Exhibit p. 12.) Again, it should be noted that the Commission works on topics authorized by legislative resolution, and there is also jeopardy in not performing the Commission's duties.

EDF believes that the "orientation of the Commission's work product to date seems almost exclusively on protecting the interests of defendants and potential defendants." (Exhibit pp. 9-10.) The staff believes that a careful review of the consultant's study and the various memorandums and drafts will not support this conclusion. The concern has been directed primarily toward conflicts and potential conflicts in a realm with nearly nonexistent standing rules (perhaps unique in the law). The focus has been on a way to provide finality of some sort to enable sensible settlement in actions on behalf of the general public. We have struggled to find procedural rules that do not destroy the remedy, but that avoid its potential for abuse, such as where a clause of action is routinely added to a complaint for settlement or discovery leverage even though there is no bona fide public interest.

Finally, EDF questions whether there may be conflicts of interests in considering this topic. (Exhibit p. 10.)

Participation

The staff urges those who have written expressing grave concerns to engage in the process of considering the issues raised in the consultant's background study and other materials and working on improvements in the statute. Opposition is premature, since the Commission has not yet approved even a tentative recommendation.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
BUREAU OF SPECIAL OPERATIONS • CONSUMER PROTECTION DIVISION

GIL GARCETTI • District Attorney
SANDRA L. BUTTITTA • Chief Deputy District Attorney
R. DAN MURPHY • Assistant District Attorney

ROBERT P. HEFLIN • Director

October 25, 1995

Colin W. Wied, Chairperson
Stan Ulrich, Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Study B-700 -- Unfair Competition

Dear Chairperson Wied, Mr. Ulrich and Members:

I write once again on behalf of the California District Attorneys Association Consumer Protection Committee, as well as my own office, to provide further input from public enforcement officials regarding the unfair competition study (B-700) and the Commission staff's September 8 draft tentative recommendation.

Our letter of September 23, 1995, addresses the general concerns of the law enforcement community with regard to the September 8 draft, and in particular the res judicata provision in proposed §385.34, and the public/private priority provision in proposed §385.40. I know some of the Commission members were unable to review that letter prior to the September 28 meeting; I will not repeat its arguments here, but commend it to all the members.

In general, that letter presents our view that public and private actions under §17200 are fundamentally different, and that those differences should be reflected in any Commission proposal.

My reason for writing today is to address issues that were raised at the September 28 meeting. Parts of that discussion suggested that some may view public civil law enforcement cases under §17200 as essentially fungible with private actions to recover restitution and attorneys' fees. In this view, all these cases are "representative actions" on behalf of the "general public" with no real differences between cases brought by prosecutors and those by, for example, plaintiffs' class action firms.

One possible result of such a conclusion would be to treat all plaintiffs -- public and private -- similarly, regardless of the nature of the action, for purposes of res judicata and priority. To some extent, the current §385.34 unified res judicata rule reflects this. This uniformity of treatment may make it difficult or impossible for our offices to protect the public and to obtain the unique public remedies which only we can seek.

201 N. Figueroa Street
Suite 1600
Los Angeles, CA 90012
(213) 580-3273

A few points regarding the differences between public and private actions illustrate this issue:

1. Actions brought by the Attorney General or the 58 district attorneys under §17200 are "civil law enforcement actions," not private tort actions or even private actions to right wrongs for the "general public." People v. Pacific Land Research (1977) 21 Cal.3d 683. In contrast to private "general public" cases, public actions are brought by different actors (elected officials vs. private interests), subject to different checks and balances, and seek to obtain remedies which differ in important ways (described in #2 below).

It is especially important to recognize -- as our entire Penal Code does so clearly -- the different roles of elected public prosecutors and private litigants. The Attorney General and the district attorneys are the representatives the people have chosen to protect their legal interests -- up to and including a monopoly over the life-and-death decisions in death penalty cases. In trade regulation law, the people have given prosecutors a unique public role to represent the "People of the State of California" in protecting consumers and the marketplace. The unique grant of civil penalties to prosecutors demonstrates that their role is different and their tools must be different.

No other actors with standing under §17204 have been chosen democratically to act for the People or to use these unique powers. It is reasonable to suggest this warrants a different set of procedural requirements and standards under §17200.

2. There are crucial differences in remedies sought by the People versus those sought by private litigants. The most obvious of these is the potent civil penalties authority vested exclusively in prosecutors. Some have suggested this creates a conflict because prosecutors may prefer a mix of penalties, restitution and fees different from that preferred by private litigants. There is absolutely no evidence of abuses in this regard. But the real point is that the People choose their public prosecutors and vest them with the responsibility for such determinations. The People's choices should be respected.

Equally important is the distinction between disgorgement and restitution in §17200 cases. As a rule private litigants are chiefly concerned with recovery for named plaintiffs or a class of members of the "general public" (in addition to attorneys' fees and costs). This is exclusively a restitutionary concern.

Public prosecutors have much broader goals (although restitution to victims is certainly one goal). Even if restitution is impractical, prosecutors routinely seek disgorgement, that is, recovery of takings from a defendant "to prevent a wrongdoer from retaining the benefits of its illegal acts," a purpose "which

would be frustrated if a party were entitled to retain its profits simply because it is difficult to specify the victim." People v. Powers (1992) 2 Cal.App.4th 330, 342. This disgorgement concern is part of the prosecutor's proper role in deterrence (Id. at 343), and thus is related to the policies behind the civil penalties power. Disgorgement alone is often of little or no interest to private litigants. Thus it is no coincidence that the long line of disgorgement decisions in California law (see People v. Powers, supra; California v. Levi Strauss & Co. (1986) 41 Cal.3d 460; People v. Parkmerced Co. (1988) 198 Cal.App.3d 683) are cases brought by public prosecutors.

In addition, there is a broad range of equitable remedies under §17200 regularly sought by prosecutors but seldom sought by private law firm litigants. Recent examples include cancellation of unlawful trust deeds (People v. Custom Craft Carpets (1984) 159 Cal.App.3d 676) and corrective advertising remedies (see e.g., Warner-Lambert Co. v. FTC (D.C.Cir.1977) 562 F.2d 749; Consumers Union v. Alta-Dena Dairy (1992) 4 Cal.4th 963).

Thus there are substantial remedies sought by prosecutors but never (civil penalties) or seldom (disgorgement, other broad equitable remedies) sought by private litigants. In this context a res judicata principle which would allow a private action to completely preempt a public action -- even one for substantially different law enforcement remedies -- would turn our California policy of law enforcement on its head. Private litigants could control whether the People's elected officials would be permitted to enforce the law.

3. We have heard comments closely analogizing the two, but in fact the §17200 context is quite unlike the world of tort law and remedies. Section 17200 is not a tort statute; it is California's "Little FTC Act." In fact, §17200 permits no recovery of damages at all (Bank of the West v. Superior Court (1992) 2 Cal.4th 1254).

To be sure, private "general public" actions for restitution bear some resemblances to private tort cases, and these actions may be a source of legitimate concern regarding redundancy. But rules to address these concerns should not preempt public enforcement actions, especially where there can be relief under less intrusive approaches, such as the principle of equitable estoppel proposed in our September 28 letter.

There is no pattern of redundancy by public officials. But this does not mean there is no case in which justice and the public interest would require additional public action. Merely because prosecutors have historically seldom followed private actions, it does follow that they should be barred from doing so where the interests of justice might require it. Collusive actions among

defendants and bad faith private plaintiffs could easily result from such a rule.

At the September 28 meeting the Commission members acknowledged some of these public/private differences when they agreed to exempt public cases from special pleading rules and from 45-day notice and hearing requirements (in most cases). We appreciate this careful effort to avoid hampering necessary law enforcement activities. We urge a similar careful approach when the res judicata and priority issues are addressed on November 2 or at subsequent hearings.

Our offices continue to believe that greater clarity on standing and finality issues would be helpful, especially where "general public" private actions follow substantial public judgments. However, we respectfully urge the Commission to distinguish appropriately among the differing public and private actions under §17200.

Thank you once again for your consideration of our views.

Best regards,

GIL GARCETTI
District Attorney

By Thomas A. Papageorge

THOMAS A. PAPAGEORGE, Head Deputy
Consumer Protection Division

Chair, Legislative Subcommittee, CDAA
Consumer Protection Committee

SENTINEL FAIR HOUSING
INVESTIGATION • EDUCATION
Tel: (510) 836-2687
Fax: (510) 836-0461

October 26, 1995

Mr. Colin Wied, Chairperson
Mr. Stan Ulrich, Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite 2D
Palo Alto, CA 94303-4739

RE: Section 17200 of the California Business and Professions Code

Dear Chairperson Wied, Mr. Ulrich and Members of the Law Revision Commission,

Sentinel Fair Housing is very concerned about the changes to the Unfair Competition Act (Section 17200 of the Business and Professions Code) that the Law Revision Commission is considering. We urge you to oppose in particular any efforts to take away the private right of action that community organizations now use in the public benefit and any efforts to require a court to determine the adequacy of the plaintiff's legal representation.

Sentinel Fair Housing is a private, non-profit fair housing organization whose mission it is to eradicate discrimination in housing. Section 17200 is an extremely important tool in our work. We and other fair housing organizations around the state have used it enjoin illegal acts of discrimination and ensure equal opportunity in housing. Currently, we are involved as plaintiffs in a case in the City of Alameda in which a large landlord has discriminated against families with children. We are able to act under the provisions of Section 17200.

I know of no case in the history of California in which a District Attorney or the Attorney General has filed suit to stop illegal housing discrimination. That task of enforcing the state's laws has been left to individuals and private fair housing organizations. Restricting the use of Section 17200 to public prosecutors will not make for better enforcement of the law, but rather less.

In addition, I understand that one recommendation to the Commission is to require the court to appoint or determine the adequacy of plaintiff's counsel. I believe this is an absurd and unprecedented proposal that would give a court veto power over a plaintiff's right to choose its own attorney. Plaintiffs need to be able to work with the attorneys with whom they feel comfortable.

I hope that you will take these viewpoints under consideration and maintain the ability of community organizations to enforce state laws that the public sector does not.

Sincerely,

Mark Stivers

Mark Stivers
Project Director

1611 Telegraph Ave., Suite 1410
Oakland, CA 94612

ENVIRONMENTAL DEFENSE FUND

California Office
Rockridge Market Hall
5655 College Ave.
Oakland, CA 94618
(510) 658-8008
Fax: 510-658-0630

October 27, 1995

Mr. Colin Wied
Chairperson
Mr. Stan Ulrich
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite 2D
Palo Alto, CA 94303-4739

Re: Study B-700 on the Unfair Competition Act (Business & Professions Code Section 17200 et seq.)

Dear Chairperson Wied, Mr. Ulrich and Members of the Law Revision Commission:

The Environmental Defense Fund is seriously concerned about the proposals for changing *Business and Professions Code* Section 17200 *et seq.* that are reflected in your most recent Draft Tentative Recommendation (Memorandum 95-43). As experienced practitioners in this area on behalf of the public interest, we would like to be actively involved in your consideration process from this point forward. To that end, please put us on your mailing list for this study, and provide us advance notice of all meetings, other proceedings, and deadlines applicable to this process.

We will provide input to your process at future meetings. However, we would like to make three initial points for your consideration:

A. **Erroneous assumptions.** Your draft recommendations seem to assume problems that either do not exist in actual practice under the Unfair Competition Act, or that exist only in isolated and unrepresentative instances. Using substantive statutory changes to address such instances is a serious misuse of the Commission's resources and reputation, and runs the risk of jeopardizing both. A primary task of the Commission should be to establish the empirical basis, if any, for the assumed problems to which your recommendations are addressed.

B. **Lack of balance in interests addressed.** The draft recommendations seem indifferent to, or ignorant of, the interests of the public intended to be protected through the mechanisms of the Unfair Competition Act, as those interests are affected in actual practice under the statute. The orientation of the Commission's work product to date seems almost exclusively on protecting the interests of defendants and potential

National Headquarters

257 Park Avenue South
New York, NY 10010
(212) 505-2100

1875 Connecticut Ave., N.W.
Washington, DC 20009
(202) 387-3500

1405 Arapahoe Ave.
Boulder, CO 80302
(303) 440-4901

128 East Hargett St.
Raleigh, NC 27601
(919) 821-7793

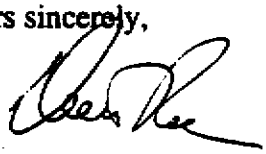
1800 Guadalupe
Austin, TX 78701
(512) 478-5161

defendants. These interests should not be ignored; but they need to be addressed in context.

C. **Applicability of conflict of interest principles**. These are important considerations which the Commission should address, even though EDF does not support the form in which they are addressed in the most recent draft. However, from our own experience in this field, we recognize that several Commissioners are members of firms that have represented defendants in actions under the Unfair Competition Act (some of those actions brought by EDF). Disclosure by each individual Commission member of possible or possibly perceived conflicts of interest in this matter would, we believe, increase public confidence in the process, as would recusal from participation under appropriate circumstances.

We look forward to participating in your process as this study goes forward.

Yours sincerely,



David Roe
Senior Attorney

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PROPOSITION 103 ENFORCEMENT PROJECT

10951 W. Pico Boulevard
3rd Floor
Los Angeles, CA 90064
(310) 475-9663
FAX (310) 470-1405

October 30, 1995

Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739
FAX: 415-494-1827

BY FACSIMILE AND US MAIL

RE: Proposed amendments to Insurance Code Section 1861.08 and the Unfair Competition Act (Business & Professions Code Sections 17200, et seq.)

Dear Mr. Sterling:

Thank you for asking the Proposition 103 Enforcement Project (the Project) for our comments regarding whether the proposed changes to Insurance Code Section 1861.08 -- the procedural provisions of Proposition 103 -- would further the consumer protection purposes of the initiative. As we discussed last month, the Law Revision Commission is proposing these amendments to conform Section 1861.08 with SB 523's amendments to the Administrative Procedures Act. We would also like to comment at this time regarding the Commission's proposal to amend Business and Professions Code Sections 17200 et seq. These sections were incorporated in Proposition 103 to enable consumers to sue insurers for unfair business practices.

Proposition 103 is a comprehensive insurance reform package. As provided in the purposes section of the initiative,

> The purpose of this chapter is to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable insurance commissioner, and to ensure that insurance is fair, available, and affordable for all Californians. (Proposition 103, Section 2).

To meet those purposes, Proposition 103 incorporated many procedural and consumer protection sections from other laws, including the Government Code and the Business and Professions Code. As described in detail below, the Project believes that some of the Commission's proposed amendments may hinder those purposes.

* * * * *

B. Proposed Amendments To The Business and Professions Code

The Project also wishes to express its grave concerns regarding the direction taken by the Commission in its Study (B-700) regarding the Unfair Competition Act (Business and Professions Code Section 17200, et seq) which is incorporated into Proposition 103 by Insurance Code Section 1861.03. The Project believes that the solutions proposed in the most recent Draft Tentative Recommendation (Memorandum 95-43) go far beyond the scope of the problems which are alleged in the Study and that major change in this area is unnecessary. Further, the Project believes that any application of these proposed amendments to Proposition 103 would require the approval of the voters because such application would not further the purposes of Proposition 103.

Prior to the passage of Proposition 103, the Insurance industry was exempted from the consumer protection and unfair competition laws which applied to every other business in the State. (Ins. Code § 1860.1). Proposition 103 halted the unfair and collusive activities of the industry by providing that:

> The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act (Civil Code Sections 51 through 53), and the antitrust and unfair business practices laws (Parts 2 and 3, commencing with section 16600 of Division 7, of the Business and Professions Code). (Insurance Code Section 1861.03(a)).

Proposition 103 thereby intended to protect insurance consumers from civil rights violations and unfair business practices as well as to encourage a competitive insurance marketplace in California. The ability of consumers to enforce the Unfair Competition Act through Section 17200 actions on behalf of the general public is an extremely important tool for the Project as well as other consumer representatives in California.

In Section 17200 cases that we are aware of, many of the problems identified in the Study simply do not exist. In fact, not enough Section 17200 actions are brought, particularly by public prosecutors, leaving the burden on public interest organizations -- such as the Project -- as well as private attorneys to enforce state laws.

Because of the lack of empirical evidence of major abuses of Section 17200 cases, we cannot support any changes that would place greater burdens on private parties bringing such actions. Further, we believe that existing means can be used to address the few problem cases. If any further action need be taken, it would more appropriately be dealt with in the legal ethics arena, rather than through major procedural changes in Section 17200 which will only serve to hinder consumers from suing to halt unfair business practices.

In addition, there are other problem areas that the Commission has not addressed that should be included if any legislation to improve section 17200 litigation is proposed. One such improvement, which was passed by the legislature but vetoed by the Governor, is a prohibition on secrecy agreements for settlements in actions brought on behalf of the general public. There is simply no justification for confidentiality in public actions such as these.

Because we believe that some of the Commission's proposed amendments to the Business and Professions Code and the Insurance Code will seriously undermine the purposes of Proposition 103, we wish to play an active role in your consideration process on these proposals. Please add the Project to your mailing list for these proposals and keep us advised of any further developments.

Once again, thank you for requesting our views regarding the proposed amendments to Section 1861.08 of Proposition 103 and the amendments to the Unfair Competition Act, which is incorporated into Proposition 103. If you have any questions regarding our remarks, please don't hesitate to call us.

Sincerely,

Harvey Rosenfield
Executive Director of the Project

Diane de Kervor
Staff Attorney for the Project

Natural Resources Defense Council

71 Stevenson Street
San Francisco, CA 94105
415 777-0220
Fax 415 495-5996

October 31, 1995

Mr. Colin Wied, Chair
Mr. Stan Ulrich
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite 2-D
Palo Alto CA 94303-4739

Re: Study B-700

Dear Messrs. Wied and Ulrich:

We are writing to express our deep concern over various proposed "reforms" to Business & Professions Code §§ 17200 et seq. While no law is beyond improvement, in our view, § 17200 has served the people of California extremely well and should be tinkered with, if at all, only with extreme caution. Unfortunately, the "reforms" proposed in the most recent draft tentative recommendation (Memorandum 95-4) could actually undermine the statutory scheme, proving a disservice to consumers and the public generally.

As you are aware, § 17200 is available not only to public prosecutors but also to private litigants acting as private attorneys general. It is in that latter capacity that NRDC has utilized the statute on many occasions and with a fair degree of success. Most recently, § 17200 litigation has been brought to protect the public from exposures to toxic substances in the drinking water, air, and other media. Indeed, our right to bring such cases, repeatedly challenged by industry, was recently reaffirmed in the courts in NRDC et al. v. Price Pfister, et al. That pending case, brought pursuant to § 17200 and Proposition 65, challenges the presence of lead leaching into drinking water from faucets manufactured with this reproductive toxin. The use of these products results in daily lead exposures to literally millions of Californians. A parallel case was also brought by the California Attorney General, and the two cases have been prosecuted cooperatively. The defendants' contention that such private litigation is barred when a public prosecutor has brought a similar case was rejected, including in a recent California Supreme Court decision denying defendants' Petition for Writ of Mandate.

In this and many other decisions, the courts have consistently recognized that private enforcement of § 17200 is an integral part of the statute, independent from and co-equal to the role of public prosecutors. In stark contrast, the thrust of the current draft tentative recommendations is to impose a series of procedural obstacles to private litigants bringing such cases in the future. In our view, these steps, by implication, would establish that

40 West 20th Street
New York, New York 10011
212 727-2700
Fax 212 727-1773

1350 New York Ave., N.W.
Washington, DC 20005
202 783-7800
Fax 202 783-5917

6310 San Vicente Blvd., Suite 250
Los Angeles, CA 90048
213 934-6900
Fax 213 934-1210

private litigants' ability to bring such cases is not concomitant with that of the Attorney General or other prosecutors. This would not be in the public interest. Indeed, if any problem needs to be addressed, it is the absence of aggressive enforcement of § 17200 by overworked public prosecutors and the vital need to encourage, not deter, private attorneys general to fill this gap.

In conclusion, imposing burdens on private plaintiffs to bring § 17200 cases is unnecessary, contrary to the overarching purposes of § 17200 and would eventually serve only to reduce protection against consumer fraud and other civil wrongs. Moreover, to adopt these "reforms" would place the Law Revision Commission squarely in the camp of the defense bar and industry, seriously jeopardizing the Commission's well-established role as a neutral and independent body. We urge this proposed draft be rejected.

Sincerely,

Al Meyerhoff
Senior Attorney

SAN FRANCISCO
Daily Journal

Monday, October 2, 1995

Official Newspaper of the
San Francisco Municipal, Superior and
United States Northern District Courts

pp. 6, 10

ADVISER LITIGATION

Unfair Trade Laws' Distinctions Are Often Confused

By Miles J. Feldman

These days most business lawsuits contain causes of action for violations of California Business and Professions Code Section 17200, commonly known as statutory unfair competition. The proscriptions of Section 17200 are far-reaching, since it broadly states that "unfair competition shall mean and include any unlawful, unfair, fraudulent business act or practice." The statute thus provides a cause of action for any activity that can be called a business practice and at the same time is either forbidden by law or is unfair or fraudulent. If a lawsuit involves conduct that could be labeled a business practice, Section 17200 may likely be invoked as a separate cause of action.

Much of the time, Section 17200 claims arise out of other statutory violations that provide the required unlawful conduct. Counsel frequently include Section 17200 claims with other theories, such as trade-secret misappropriation, in an effort to recover additional remedies. Many times practitioners incorrectly assert that by setting forth a cause of action pursuant to Section 17200, their clients are entitled to seek compensatory, treble and punitive damages as well as attorneys' fees otherwise not available under other theories.

The truth is that parties bringing causes of action pursuant to Section 17200 are limited to injunctive relief and restitution only.

Section 17200 is part of a statutory framework beginning with Section 17000. Although Sections 17000 and 17200 are part of the same general scheme, they represent separate and distinct legislative acts that provide different remedies for specific enumerated violations. These statutes expressly set forth that Sections 17000-17101 are Chapter 4, codified in 1941 and titled in Section 17001 as the Unfair Practices Act; and that Sections 17200-17208 are Chapter 5, codified in 1977 and referred to as the "Unfair Competition Act," although no name for this act is set forth in the statute.

The statutory distinction between Chapters 4 and 5 is critical because Chapter 4 precludes only certain practices: price discrimination by locality (Section 17040); sales or services wantonly below cost (Section 17043); loss-leader practices (generally, selling products at less than cost to promote purchase of other merchandise (Section 17044); secret payment of rebates (Section 17045); and use of threats, intimidation or collusion to achieve the above violations (Sections 17046-17048). These specific violations substantially mirror federal antitrust laws and must be contrasted with the much broader proscriptions of Section 17200 addressing *any* unlawful, unfair or fraudulent business practices.

Some contend that Section 17200 must be read in conjunction with the remainder of the Business and Professions Code sections dealing with unfair trade practices for which damages, including treble damages and attorneys' fees, are available. Section 17082 actually mandates both treble damages and attorneys' fees. However, Section 17082's applicability to violations of Section 17200 is not supported by either the language of the statutes or the legislative scheme to which they belong.

The myth that treble damages and attorneys' fees are recoverable for Section 17200 violations is due in part to the lack of an apparent distinction between Chapters 4 and 5 and the somewhat misleading layout of the statutes within the Business and Professions Code.

The titles of the chapters fuel confusion as to the exact scope of these acts. Chapter 4 is entitled "Unfair Trade Practices," although Sections 17000-101 are referred to as the "Unfair Practices Act." Chapter 5, on the other hand, is entitled merely "Enforcement." Given this, one might assume that Section 17200 serves as an enforcement mechanism for Chapter 4 by providing a cause of action for unlawful or unfair business practices. This assumption, however, is not supported by the wording of the statutes, their legislative history or their structure apart from the misleading titles.

Also adding to the confusion is the trouble some courts have differentiating between the chapters and the contradictory nomenclature they have used to refer to the various statutes. Most recently, the California Supreme Court appropriately denominated Section 17200 as the "Unfair Competition Act." *Manufacturers' Life Ins. Co. v. Superior Court*, 10 Cal.4th 257, 263 (1995). The California Court of Appeal in *Manufacturers' Life* had noted the misleading labeling of the acts by the Legislature, and noted that the Supreme Court has in the past used the term "Unfair Practices Act" to refer to *both* Chapters 4 and 5. *Manufacturers' Life*, 33 Cal.App.4th 821, 828 (1994).

For example, the Supreme Court discussed Section 17200 but labeled it as California's "Unfair Practices Act" and cited to Section 17000 in *State ex rel. Van de Kamp v. Texaco Inc.*, 46 Cal.3d 1147, 1169-70 (1988). One California federal court inadvertently referred to a claim for unlawful business practices under Section 17200 as one brought pursuant to the "Unfair Business Practices Act" and cited to Section 17000 et seq., incorrectly implying that Section 17200 is one of the specific violations of Section 17000. *Microsoft Corp. v. A-Tech*, 855 F.Supp. 308, 313

Continued on Page 10

Miles J. Feldman is a business litigation associate at the Los Angeles office of Lord, Bissell & Brook.

Trade Laws' Distinctions Often Confused

Continued From Page 6
(C.D. Cal. 1994).

Chapter 4's legislative purpose was also inappropriately used by both the *Van de Kamp* and *Microsoft* courts to discuss Chapter 5 violations for unlawful, unfair or fraudulent business practices. The issue of remedies, however, was not litigated in either of these cases.

Under the statute's plain language, Section 17082 cannot be applied to a claim for unfair competition under Section 17200 because Section 17082 is located in Chapter 4 and provides in relevant part: "In any action under this chapter ... any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages. ..." Thus, the infamous treble-damages provision of Section 17082 is explicitly chapter-specific and does not apply to actions brought under different chapters, such as Chapter 5, the Unfair Competition Act.

With respect to attorneys' fees under the Unfair Practices Act, Section 17082 provides in relevant part: "In any action under this chapter ... the plaintiff shall be awarded a reasonable attorney's fee." Thus, the attorneys' fees provision of Section 17082 also expressly limits its application to actions brought under Chapter 4.

The only case that provides any express analysis of the applicability of Section 17082 to claims for unlawful, unfair and fraudulent business practices brought under Section 17200 is *Patchmayr Gun Works Inc. v. Olin Mathieson Chemical Corp.*, 502 F2d 802 (9th Cir. 1974). In *Patchmayr*, the 9th U.S. Circuit Court of Appeals held that a plaintiff could not recover attorneys' fees for a cause of action for unlawful business practices under Section 17200 because Section 17082 was not applicable. Id. at 810.

The *Patchmayr* court stated: "[A] careful, analysis of the Business and Professions Code and the various and separate legislative acts it contains, makes clear that the quoted language 'this chapter' refers to Chapter 4 of that Code entitled the Unfair Practices Act, which is a piece of legislation which deals almost exclusively with cases of price discrimination, secret rebates and 'loss selling.'" Id.

Despite the perceived lack of precision used by the Legislature and the courts, the only remedies available to plaintiffs asserting unfair competition claims for unfair, unlawful or fraudulent business practices under Section 17200 et seq. are those within Chapter 5. With respect to private litigants, they are restricted to the remedies outlined in Section 17203, which provides: "The court may prevent the use or employment ... of any practice which constitutes unfair competition ... or ... restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Thus, Section 17203 does *not* authorize treble damages or attorneys' fees.

Similarly, compensatory damages may not be recovered under Section 17203. The Supreme Court dispelled this notion in *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1267 (1992). There, the court confronted the issue of whether a comprehensive general liability insurance policy covered a cause of action under Section 17200 and held that because the insurance policy only covered damages, it did not provide coverage for a Section 17200 cause of action. Section 17203 does not authorize an award of damages; only injunctive relief and restitution are authorized as remedies for statutory unfair competition. Id.

Recently, the Court of Appeal held that any restitutionary relief must be ancillary to injunctive relief; a plaintiff may not seek restitution alone. *ABC International Traders Inc. v. Matsushita Electric Corp. of America*, 95 Daily Journal D.A.R. 12662, 12665 (2d Dist. Sept. 20, 1995).

Punitive damages are not recoverable for violations of Section 17200 either. Absolutely nothing in Chapter 4, Chapter 5 or elsewhere in the Business and Professions Code even potentially allows the recovery of punitive damages for a Section 17200 cause of action for unlawful, unfair or even fraudulent business practices. Furthermore, no reported cases have authorized punitive damages for such a cause of action. Since punitive damages cannot be awarded as a matter of right and must be authorized by statute, such damages are simply not recoverable for Section 17200 claims.

When faced with a Section 17200 claim seeking compensatory, treble and punitive damages or attorneys' fees, practitioners should attack the pleading with a demurrer and motion to strike. This will help to prevent the party bringing the claim from needlessly overvaluing the worth of the case at a relatively early stage of the litigation.

Serving Redwood City through Sunnyvale

Midpeninsula Citizens for Fair Housing

457 KINGSLEY AVENUE
(415) 327-1718 PALO ALTO, CA 94301

October 26, 1995

Mr. Colin Wied, Chairperson
Mr. Stan Ulrich, Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite 2D
Palo Alto, CA 94303-4739

RE: Section 17200 of the California Business and Professions Code

Dear Chairperson Wied, Mr. Ulrich and members of the Law Revision Commission,

Midpeninsula Citizens for Fair Housing is very concerned about the changes to the Unfair Competition Act (Section 17200 of the Business and Professions Code) that the Law Revision Commission is considering. We urge you to oppose in particular any efforts to take away the private right of action that community organizations now use in the public benefit and any efforts to require a court to determine the adequacy of the plaintiff's legal representation.

Midpeninsula Citizens for Fair Housing is a private, non-profit fair housing organization in Palo Alto whose mission is to eradicate illegal discrimination in housing. Section 17200 is an extremely important tool in our work. We and other fair housing organizations around the state have used it to enjoin illegal acts of discrimination and ensure equal opportunity in housing. In fact it was our office in the case of MCFH v. Westwood Investors which established the private right of action now under consideration.

I know of no case in the history of California in which a District Attorney or the Attorney General has filed suit to stop illegal housing discrimination. The task of enforcing the state's laws has been left to individuals and private fair housing organizations. Restricting the use of Section 17200 to public prosecutors will not make for the better enforcement of the law, but rather less.

In addition, I understand that one recommendation to the Commission is to require the court to appoint or determine the adequacy of plaintiff's counsel. I believe this is an absurd and unprecedented proposal that would give a court veto power over a plaintiff's right to choose its own attorney. Plaintiff's need to be able to work with the attorneys with whom they have confidence.

I hope that you will take these viewpoints under consideration and maintain the ability of community organizations to enforce state laws that the public sector does not.

Sincerely,

Winter Dellenbach
Senior Fair Housing Specialist

CONSUMER ATTORNEYS OF CALIFORNIA

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Associate Legislative Counsel
Lee-Ann Tratten
Legal Analyst

November 1, 1995

Mr. Colin Wied, Chairperson
Mr. Stan Ulrich, Assistant Executive Secretary
California Law Revision Commission
Palo Alto, CA 94303-4739

Re: Study B-700 (OPPOSE)

Dear Chairperson Wied, Mr. Ulrich and Commission Members:

The Consumer Attorneys of California opposes Study B-700, which contains draft recommendations to change Business and Professions Code § 17200, et seq., and §17500, et seq. We have just received the draft dated October 24, 1995 and incorporate our comments on that revision in advance of tomorrow's hearing.

As a follow-up to our appearance before the Commission on September 28, 1995, we are writing to express serious concern with respect to various proposed amendments to the code sections. This statutory scheme to regulate unlawful business practices and false advertising has served the consumers of California extremely well during its life. With few isolated exceptions, it has been properly enforced by both governmental entities and private lawyers representing affected individuals and the "general public." Regrettably, the amendments proposed in the most recent October 24th draft tentative recommendation could actually eviscerate the statutory scheme, thereby doing a disservice to consumers and the public generally who are the intended beneficiaries of this legislation.

As drafted, §§ 17200 and 17500 may be invoked not only by public prosecutors but also private litigants who act as private attorneys general on behalf of the affected general public. Members of the Consumer Attorneys of California

Legislative Department

980 9th Street, Suite 200, Sacramento, CA 95814-2721 ■ (916) 442-6902 ■ FAX (916) 442-7734

have acted in the latter capacity. They have invoked the statute on many occasions with substantial success. They have brought 17200 and 17500 actions to protect affected members of the public from unlawful business practices resulting in substantial overcharges for financial services, (See Hitz v. First Interstate Bank (1995) 38 Cal.App.4th 274), and to enjoin tobacco manufacturer advertising targeted at minors. See Mangini v. R.J. Reynolds (1994) 7 Cal.4th 1057. Over the past ten years, the statute has been invoked by private litigants and organizations to enjoin and obtain restitution for California residents subjected to, among many other business practices, unlawful and unfair forced placed automobile insurance, insurance packing on consumer goods, vocational school fraud, forced mandatory arbitration in agreements for financial services, and false advertising in connection with cereal products, milk, furniture, home burglar alarm systems, and adjustable rate mortgages. In most instances, these cases have been litigated either by private litigants or by public prosecutors; rarely have parallel cases been brought and most of those cases have been prosecuted cooperatively. In many cases, courts have recognized that private enforcement of §§ 17200 and 17500 is a integral part of the statutory scheme. These opinions flow from the statutory language itself which authorizes lawsuits to be brought by any number of specific public prosecutors and by "any individual."

The thrust of the current revised draft tentative recommendations is to impose a number of procedural hurdles on private litigants who bring such cases in the future. Forcing cases instituted by private litigants represented by established attorneys throughout California to take a back seat to cases filed by the Attorney General or other public prosecutors would diminish the recovery by affected members of the general public and would adversely affect the public interest in many cases. Indeed, it has been our experience and the experience of our members that overworked public prosecutors are unable to address the many substantial instances of unlawful and deceptive business practices that affect consumers in California each year. Private litigants and private attorneys need to be encouraged, not deterred, from fulfilling the role envisioned for them by the Legislature in enacting this statutory scheme.

We submit strongly that harmful provisions in the revised draft tentative agreement should be eliminated. For example, § 385.40 which requires that a private action be stayed where a public action has been filed should be eliminated. Trial courts should retain their existing jurisdiction to manage effectively their calendar and to employ historical mechanisms such as coordination and consolidation of actions in order to ensure that affected members of the public are effectively represented and that the goal of restitutionary monetary relief not be abandoned solely to obtain prospective injunctive relief or civil penalties.

Provisions requiring alternative showings and judicial findings of a lack of

conflict of interest on the part of the private plaintiff and adequacy of representation by attorneys for such a party are burdensome and unnecessary. There are no reported instances of abuse in this area. Likewise, the provision requiring judicial approval of settlements under this scheme serves to impose class action procedural requirements on a statutory paradigm devised to avoid the complexity in exchange for limited, discretionary relief fashioned by a judge rather than a jury.

For plaintiffs, the scheme provides a vehicle to obtain relatively quick relief without imposing class requirements on the individual or a plaintiff's counsel and by providing injunctive and ancillary restitutionary relief; for defendants, invocation of the statute eliminates a jury trial and any damages for the individual or members of the general public. It invests great discretion in the trial judge to award appropriate and limited relief to eliminate the practice and to disgorge ill-gotten gains. Overlaying the class action vehicle will impose significant delays and hurdles to the plaintiffs; for defendants, it will trigger jury trials and the potential for awards of damages and punitive damages.

In sum, imposing substantial burdens on private plaintiffs who bring § 17200 and § 17500 cases is unnecessary, counterproductive, contrary to the overriding purposes of this statutory scheme and will ultimately reduce protection against consumer fraud and other civil wrongs. We urge the Commission to reconsider and reject the revised draft in its present form. CAOC Board Member Jim Sturdevant will be present at the November 2 hearing to answer any questions and expand upon our opposition.

Sincerely,

Mary Alexander

Mary Alexander
President-Elect

cc: James C. Sturdevant, Esq.
The Sturdevant Law Firm